UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADT, LLC	§	
	§	**Cases 16-CA-144548**
Respondent,	§	**16-CA-168863**
	§	**16-CA-172713**
and	§	**16-CA-179506**
	§	**16-CA-189805**
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,	§	**16-CA-187497**
	§	**16-CA-191963**
	§	**16-CA-199947**
Charging Party.	§	**16-CA-200961**
	§	**16-CA-209070**
	§	**16-CA-209995**
	§	

CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S LIMITED CROSS-EXCEPTION AND BRIEF IN SUPPORT THEREOF, TO THE ADMINISTRATIVE JUDGE'S DECISION

TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:

COMES NOW Charging Party Communications Workers of America, AFL-CIO ("Charging Party" or "the Union" or "CWA") and, pursuant to Section 102.46(b) of the Rules and Regulations ("R&R") of the National Labor Relations Board ("NLRB" or "the Board"), 29 C.F.R. § 102.46(b), files this answering brief to the April 4, 2019 limited cross-exception filed by Counsel for the General Counsel ("General Counsel"), and in opposition to the arguments of the General Counsel would respectfully show the Board the following:

I. Introduction and Summary of the Case

CWA hereby adopts and incorporates the introduction and summary of the case included in its April 4, 2019 answering brief ("Answering Brief") to the exceptions filed by Respondent ADT, LLC ("ADT" or "Respondent"). (Answering Brief, pp. 1-3). Specifically relevant to the General Counsel's exception, the Administrative Law Judge ("ALJ") held in his November 16,

2018 Decision ("Decision") that ADT violated Section 8(a)(5), 29 U.S.C. § 158(a)(5) of the National Labor Relations Act ("the Act" or "NLRA") "when it unilaterally failed to remit dues to the Union," in accordance with the NLRB's holding in *Lincoln Lutheran Racine*, 362 1655 (2015). (Decision, p. 20).

The General Counsel's exception asserts that the ALJ applied the incorrect standard in his ruling because the ALJ failed to take into account alleged limitations imposed by the parties' collective bargaining agreement ("CBA"). In regards to dues, the CBA states in Article 3, Voluntary Check-Off, that "For the period of this Agreement," dues will be deducted from employee pay checks and remitted to Union "upon receipt of a written personally signed authorization on a form approved by the Employer from any employee subject to this Agreement." (General Counsel Exhibit ("GC") 4, p. 3).

II. Arguments and Authorities

The ALJ, in following *Lincoln Lutheran*, correctly applied to the law to the facts of the case. The six word phrase that the General Counsel hangs its argument on at the beginning of the dues deduction article of the CBA (GC 4, p. 3) does not constitute clear and unmistakable waiver such that it limits the right established in *Lincoln Lutheran* for dues deduction to continue after expiration of the CBA. The Board should overrule the General Counsel's exception and continue to apply the holding of *Lincoln Lutheran* in cases where dues deduction is unilaterally terminated after expiration of CBA.

a. Article 3 of the CBA does not amount to a clear and unmistakable waiver of a statutory right

It has long been recognized that unilateral changes to mandatory subjects of bargaining violate the duty to bargain in good faith under the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). Under *Katz*, "an employer's unilateral change in conditions of employment under negotiation is

similarly a violation of § 8 (a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8 (a)(5) much as does a flat refusal." *Katz*, 369 U.S. at 743. The holding of *Katz* "has been extended to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988)); see also *Air Convey Indus.*, 292 NLRB 25, 25-26 (1988) (holding "It is well established that Section 8(a)(5) and (1) of the Act prohibits an employer who is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union."). The language of a labor agreement may waive this statutory right if that language amounts to a "clear and unmistakable" waiver of the right. *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1984).

The General Counsel's theory in its exception asserts that CWA waived the continuation of dues deduction by agreeing to language in Article 3 that states dues deduction continue "For the period of this Agreement." (General Counsel Exception Brief ("Brief"), pp. 3-6). This argument is flawed, first, because language such as that used in Article 3 has been previously held to not constitute waiver such that an employer could automatically terminate payroll deductions for other purposes. The General Counsel's efforts to argue for a new standard are also flawed because, as developed below, waiver of statutory rights must meet the "clear and unmistakable" standard of *Metropolitan Edison.*

1. "For the period of this Agreement" as used in the CBA does not amount to a "Clear and Unmistakable" Waiver of the statutory right to preserve the status quo post-expiration

The "clear and unmistakable" standard of *Metropolitan Edison* is not met in this case because the Board has previously held that language similar to the language used in Article 3 does not permit an employer to take unilateral action. In *Finley Hospital*, 362 NLRB 915 (2015), a case concerning annual wage increases following expiration of a labor agreement, the Board recognized that there was a difference between a contractual obligation and the statutory obligation maintain the status quo post-expiration. *Finley Hospital*, 363 NLRB at 917. Language such as that found in Article 3 may limit the contractual obligation, but it is insufficient to waive the statutory right because it does not amount to a clear and convincing waiver. *Finley Hospital* at 917.

Language like that found in Article 3 and *Finley Hospital* does not satisfy the "clear and unmistakable" threshold of *Metropolitan Edison* because it fails "to 'unequivocally and specifically express [the parties'] mutual intention to permit unilateral employer action with respect to [the annual wage increases].'" *Finley Hospital* at 917 (quoting *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007)). In *StaffCo of Brooklyn, LLC*, 364 NLRB No. 102 (2016), a case concerning pension benefits post-expiration, the Board likewise found no "clear and unmistakable" waiver of statutory rights because the term at issue "contains no express authorization of unilateral action by the Respondent." *StaffCo*, 364 NLRB slip op. at 3.

Like the language at issue in *Finley Hospital* and *StaffCo*, Article 3 of the CBA at issue in this case does not expressly privilege unilateral action by ADT, and specifically does not say ADT can terminate dues deduction. The absence of language authorizing the employer to take action undermines the General Counsel's assertion that Article 3 constitutes waiver of the

statutory right to maintain the status quo upon expiration. As such, the language of Article 3 does not waive the right to maintain the status quo upon expiration.

2. The General Counsel's arguments that the Board apply the "plain meaning" of Article 3 is inconsistent with and unsupported by Board law

The General Counsel largely concedes that under current law the language in Article 3 does not amount to a waiver. (Brief, pp. 5-6; see also p. 5, n. 2). The General Counsel seeks to overcome this defect by arguing that the plain meaning of the language, a standard the General Counsel implies would be different and less exacting than that of *Metropolitan Edison*, be adopted because "disputes involving dues checkoff provisions and authorizations essentially involve contact interpretation." (Brief, p. 6, citing *Kroger Co.*, 334 NLRB 847, 849 (2001)).

This argument fails for two reasons. First, under the facts of this case, the issue is post-expiration revocation of the dues deduction article. As argued above, this issue arises in the context of the statutory duty to maintain the status quo upon expiration and is thus clearly a statutory rather than contractual question. As such, under *Finley Hospital* and *StaffCo*, Article 3 does not waive the statutory right to preserve the status quo upon expiration.

Second, *Kroger* did not apply a "plain meaning" standard to the contact in that case; it applied a "clear and unmistakable" standard to the contract before it. *Kroger*, 334 NLRB at 849 (citing *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 328(1991)). The standard used by the Board in *Lockheed* was in fact derived from *Metropolitan Edison*. *Lockheed*, 302 NLRB at 322, n. 24 (holding "We will require clear and unmistakable language waiving the right to refrain from assisting a union, just as we require such evidence of waiver with regard to other **statutory rights**." (emphasis added)).

It is apparent from reviewing the cases cited by the General Counsel that the authority relied on by the General Counsel to avoid application of the holdings of *Finley Hospital* and

StaffCo to Article 3 of the CBA do not, in fact, support the position of the General Counsel because *Kroger* and *Lockheed* require "clear and unmistakable waiver" just as *Finley Hospital* and *StaffCo* because all four are derived from *Metropolitan Edison*.

Kroger's foundation in *Metropolitan Edison* is also crucial because it undermines the General Counsel's contention that matters concerning dues deduction are contractual rather than statutory. *Lockheed* explicitly states that it is a statutory matter and, pursuant to *Metropolitan Edison*, required that waiver of the right under the Act in that case to be clear and unmistakable. The General Counsel has presented no authority to support departing from this standard in regards to Article 3 because no such authority exists. This exception should therefore be overruled because the language of Article 3 does not meet the "clear and unmistakable" requirement for waiver of statutory rights.

b. *The General Counsel's arguments as to the unique nature of dues deduction are unavailing*

The General Counsel argues that the nature of dues deduction is unique and therefore should be assessed under a standard different from that of other mandatory subjects of bargaining. (Brief, pp. 7-9). These arguments fail first because they miss the point raised above in the previous section; there is only one standard for assessing whether a unilateral change to mandatory subjects of bargaining is permitted and that is if there is clear and unmistakable waiver of the right to maintain the status quo upon expiration. The fact that dues deduction exists only as a creature of the labor agreement and the dues authorization card has no bearing on the fact that dues deduction is a mandatory subject of bargaining that can only be changed unilaterally if there has been clear and unmistakable waiver.

Second, contrary to the assertion of the General Counsel, dues deduction does affect wages to the extent it impacts an employee's take home pay. An employer unilaterally

terminating dues effectively increases an employee's take home pay by an amount equal to what would be deducted in dues. The ability of an employer to do so amounts to a unilateral ability to raise wages, which is impermissible under the Act.

Further, the clearly and unmistakable standard applies to both the right to be free of unilateral changes under the Act under *Finley Hospital* and *StaffCo* and the Section 7 rights implicated by dues deduction under *Kroger* and *Lockheed*. As such, the Section 7 interest that the General Counsel alludes to in his brief is already protected by the clearly and unmistakable standard of *Metropolitan Edison* and there is no need under the facts of this case to revisit and potentially undermine those safeguards.

Finally, the economic weapon argument raised by the General Counsel as a justification for permitting termination of dues deduction upon the expiration of the contract would not provide employers with a "mild" economic weapon as the General Counsel alludes to in his brief, but rather a super economic weapon. Employers are free at impasse to make unilateral changes consistent with their bargaining proposals. Under the scheme proposed by the General Counsel, employers would be free to terminate dues upon expiration automatically, without having first proposed and bargained over the termination of dues. This ability would render dues termination a super weapon that is unique because the employer would not have to propose and bargain over this change prior to implementing it. The implementation of such a super economic weapon as sought by the General Counsel would frustrate the process of collective bargaining by removing the termination of dues from the ambit of bargaining and placing over a union the proverbial Sword of Damocles; a unilateral change that could be imposed in the absence of impasse and one that would not be subject to bargaining. This exception to the law of impasse as

well as prohibition against unilateral changes is not justified and it should be rejected and overruled by the Board.

c. *Issues raised by the General Counsel beyond the scope of the exceptions cannot be considered*

The General Counsel urges the Board to reconsider an issue not raised by the exceptions in this case, specifically the standard for employee revocation of dues authorization post-expiration, **"Although not specifically at issue in this case."** (Id., p. 9 (emphasis added)). Matters outside the bounds of the exceptions cannot be raised in the brief. NLRB Rules and Regulations ("R&R") 102.46(a)(2); 29 CFR 102.46(a)(2) (stating "Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions."). In this case, the General Counsel excepts to (1) the ALJ's alleged failure to apply the wrong standard in analyzing the language of the CBA to determine if the obligation to deduct dues survived expiration and (2) clarify the standard of enforcing dues checkoff agreements. (Brief, p. 2).

The complaint did not raise a dues revocation issue, the ALJ made no ruling as to revocation, and, most importantly, there is no exception concerning dues revocation; a point conceded by the General Counsel in its first sentence on this topic. The question of dues revocation is not properly before the Board and the General Counsel's arguments that the Board should reconsider a standard as to dues revocation are not permitted by the NLRB's Rules and Regulations. This argument should therefore be rejected and overruled.

III. Conclusion & Prayer

Charging Party Communications Workers of America, AFL-CIO prays the Board reject the arguments of the General Counsel, overrule the General Counsel's exceptions, and uphold and enforce the ALJ's decision that ADT violated the Act when it unilaterally ceased deducting and remitting dues.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This section is to certify service of the above and foregoing instrument has been forwarded electronically to the parties below on May 2, 2019 as follows:

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